IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5625 of 1988

For Approval and Signature:

HON'BLE MR.JUSTICE AKIL KURESHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

TRIKAMLAL NARANDAS SHAH

Versus

GENERAL MANAGER

Appearance:

1. Special Civil Application No. 5625 of 1988

MR PK JANI for Petitioner No. 1

SERVED BY RPAD - (R) for Respondent No. 1-2

MR NANDISH CHUDGAR for NANAVATI ASSOCIATES for Respondent No. 3

CORAM : HON'BLE MR.JUSTICE AKIL KURESHI

Date of decision: 08/09/2004

ORAL JUDGEMENT

In the present petition, the petitioner has

prayed for a direction for releasing the amount of provident fund and gratuity due to the petitioner. The petitioner while working with the respondent Bank, was tried Departmentally pursuant to a charge-sheet dated 28.12.1981. Upon conclusion of the Departmental proceedings, the disciplinary authority by its order dated 15.7.1983, was pleased to dismiss the petitioner from service. Having failed in the Departmental appeal, the petitioner challenged the said penalty imposed upon him by filing Special Civil Application No. 2186 of 1984. When the said petition was pending, the petitioner filed the present petition and prayed that the provident fund and gratuity dues of the petitioner be paid over to him.

2. By separate judgement and order passed today, this Court has partially allowed the above mentioned Special Civil Application No. 2186 of 1984. The dismissal order of the petitioner is set aside, the disciplinary authority is however, given liberty to proceed further with the Departmental enquiry from the stage of supplying tentative reasons for disagreement with the findings of the enquiry officer.

3. Appearing for the petitioner, the learned Counsel Shri P.K. Jani has submitted that the respondents cannot with-hold the provident fund and gratuity payable to the petitioner even if the order of dismissal is finally upheld. He contends that the petitioner is entitled to receive the entire amount of provident fund including the employer's contribution and the gratuity, since there is no legal justification available to the respondents to withhold the same.

4. Appearing for the respondents learned Advocate Shri Nandish Chudgar opposes the petition and submits that earlier in view of the dismissal the petitioner could not have claimed the employer's contribution of provident fund as well as the entire amount of gratuity. He submits that now that the question of passing fresh orders is at large before the disciplinary authority, and until conclusion of the said proceedings the petitioner cannot be paid the provident fund and gratuity. He relies on Rule 8 of the Bank of India Provident Fund Rules in support of these contentions. He submits that the conduct of the petitioner has led to a situation where various loans granted to the tune of Rs. 81,000/- was not possible for the respondent Bank to recover and had to be written-off as bad debts, which has caused a loss to the Bank to the tune of Rs. 3,05,401/- and therefore, in view of the said provisions, the petitioner

is not entitled to receive any amounts.

5. It is stated at the bar that during the pendency of the petition, by virtue of an interim order of this Court, the petitioner is already paid over his contribution to the provident fund. The question therefore, remains to be decided is with respect to the entitlement of the petitioner to receive the employer's contribution of the provident fund as well as the gratuity.

6. Since the respondents have relied on Rule 8 of the Bank of India Gratuity Rules and Rule 13 of the Bank of India Provident Fund Rules for withholding the gratuity and provident fund respectively of the petitioner, it is required to examine whether the said Rules would authorise the Bank to forfeit the gratuity or the provident fund in the facts of the present case even if the petitioner was dismissed from service.

Rule 8 of the Bank of India Gratuity Rules reads as follows:-

"8. Gratuity when payable and when may be forfeited :

Subject to the provisions of the Payment of Gratuity Act, 1972, or any other law relating to the payment of gratuity to any class of employees or any part thereof-

Gratuity as specified in Rule 9 shall be payable to an employee after he has rendered continuous service to the Bank-

(a) for not less than five years in case of employees who are governed by the Payment of Gratuity Act, 1972, and

(b) for not less than ten years in case of officers and other employees not governed by the said Act -

(i) on his retirement or resignation, or

(ii) on his death whilst in the service of the Bank, or

(iii) on his incapacitation, to be certified by a medical

practitioner acceptable to the Bank, to serve the Bank due to accident or continued ill-health or disease, or

(iv) on termination of his service by the Bank,

Provided that the completion of continuous service of five years or ten years as aforesaid shall not be necessary where the termination of the service of a member with the Bank is due to the reason mentioned, in clause (ii) or (iii) or (iv) of this Rule;

Provided further that there will be no forfeiture of gratuity for dismissal on account of misconduct except in cases where such misconduct causes financial loss to the Bank and in that case to that extent only.

Explanation: - For the purpose of this Rule, continuous service means uninterrupted service and includes service which is interrupted by sickness, accident, leave, lay-off, strike or a lock out or cessation of work not due to any fault of the employee concerned, whether such uninterrupted or interrupted service was rendered before or after the commencement of these Rules."

In the said Rule 8 of the Bank of India Gratuity Rules it is clearly provided that there will be no forfeiture of gratuity for dismissal on account of misconduct except in cases where such misconduct causes financial losses to the Bank and in that case to that extent only.

7. Rule 13 of the Bank of India Provident Fund Rules reads as follows:-

"13. Recovery by Bank :

(1) On any member ceasing to be in the service of the Bank or while continuing to be in the service of the Bank, with the permission of the Bank ceasing to participate in the Fund that portion of the balance of the Bank's contributions to his credit which shall not be due to him under the provisions of the preceding Rule -

(i) may be recovered by the Bank from the fund, subject to the provisions of any law for the time being in force which might prohibit or restrict such recovery, and

(ii) if recoverable by the Bank shall, on the day on which he ceases to be in the service of the Bank or while continuing to be in the service of the Bank, with the permission of the Bank ceases to participate in the Fund, be payable by the Trustees to the Bank;

Provided that if the monies so payable to the Bank shall not have been claimed by the Bank within a period of three years from the date on which such member ceased to be in the service of the Bank, or as the case may be, while continuing to be in the service of the Bank, with the permission of the Bank ceased to participate in the Fund, or if the monies shall not be recoverable by the Bank, such monies, may in the discretion of the Trustees, be forfeited to the Fund and may be retained or from time to time be treated and dealt with as income or be applied in any other wise as the Trustees shall in their absolute discretion deem fit.

(2) On any member ceasing to be in the service of the Bank in consequence of dismissal for misconduct, the amount of any loss or damage, of which the Bank shall be the sole judge, resulting to the Bank from such misconduct but not exceeding the balance of the Bank's contributions due to such member under the provisions of the preceding rule may be recovered by the Bank from the Fund and shall, on the day on which he ceases to be in the service of the Bank, be payable by the Trustees to the Bank: Provided that notwithstanding anything contained in the Rules the accumulated

balance due to such member shall be reduced by such portion thereof as shall be payable to the Bank under the foregoing provisions of this sub-rule."

It can be seen from the said Rule that the Bank is authorised to recover from the Bank's contribution to the provident fund, any loss or damage caused to the Bank from such misconduct for which the employee is dismissed from service. It also provides that the Bank will be the sole judge to ascertain such loss.

8. From the reading of the above quoted Rules, it can be seen that the gratuity can be withheld to the extent of the financial loss caused to the Bank on account of misconduct of the employee, which misconduct has led to his dismissal from service. Similarly, the Bank's contribution of provident fund can be forfeited if the employee has been dismissed from service on account of misconduct, which has caused any loss or damage to the Bank and only to the extent of such loss or damage. It is therefore essential that before the Bank effects any forfeiture of gratuity or provident fund money, the loss caused to the Bank is quantified. No such quantification can be done without hearing the delinquent officer. In the present case, no material has been placed before this Court to suggest that any quantification of loss or damage caused to the Bank was ever carried out by the respondents. In the affidavit it is only stated that due to major misconduct committed by the petitioner in sanctioning loans to various borrowers to the tune of Rs. 81,000/-, the respondent Bank was not able to recover the same from borrowers and the said amounts were treated as bad debts, which caused loss to the Bank to the tune of Rs. 3,05,401/-. The respondents have not specified any particulars of loans sanctioned by the petitioner for which he was dismissed from service and which has also resulted into loss or damage to the Bank. No details have been supplied as to how the Bank have calculated the loss of Rs. 3,05,401/-. The details of loans sanctioned by the petitioner have also not been provided. It is also not stated as to for realising of which loans the petitioner was tried Departmentally resulting into his dismissal from service.

9. In the decision of Jansukhlal C Nagori Vs. Regional Manager, Union Bank of India, reported in 2003 (1) GLR 614, learned Single Judge of this High Court while interpreting the provisions of Union Bank Employees' Provident Fund Rules and Union Bank Employees' Gratuity Rules was pleased to hold that before

withholding of gratuity and employer's share of provident fund of an employee who is dismissed for misconduct, the Bank is required to ascertain and declare the actual loss caused by the misconduct of the employee, and the amount cannot be withheld when actual loss is not ascertained and declared. It was also held that before ascertaining the loss or damage, the employee would have tobe given an opportunity to show that forfeiture was not justified. The learned Single Judge had relied on a Division Bench decision of this Court in Central Bank of India Vs. Ghanshyamlal Mohanlal Jani, reported in 1981 GLR 145. It may be noted that Rule 18 of the Union Bank Employees' Provident Fund Rules also authorised the Bank to recover from the employer's contribution to the provident fund any amount of loss or damage caused to the Bank which resulted into dismissal of the service of the employee and that the amount of loss or damage declared by the Bank was final and conclusive. One therefore finds that Rule 13 of the Bank of India Provident Fund Rules provides for similar provision with respect to the power of the Bank to recover the loss from the employer's contribution to the provident fund, as Rule 18 of the Union Bank Employees' Provident Fund Rules. With respect to the gratuity also, this Court noticed similar limitations on the power of the Bank to forfeit the gratuity only to the extent of financial loss caused on account of the misconduct which resulted into dismissal of the employee. On the basis of the said conclusions, the learned Judge was pleased to quash the action of the Bank in withholding the provident fund and gratuity amounts. The learned Judge was also pleased to reject the contention made on behalf of the Bank that the matter should be reverted back to the Bank for appropriate steps, since it was found that the exercise was required to be carried out long back and the decision in that behalf was required to be taken at that time. In that case the learned Judge was pleased to find that the decision was ultimately communicated at a very late stage after almost 7 years, that too without following due procedure of law and in view of the fact that the Court found that the petitioner in that case was denied the said benefit for almost 14 years, the petitioner cannot be deprived of the same any longer. The said decision of the learned Single Judge was carried in appeal by the Bank concerned and the Division Bench of this Court while disposing of the Letters Patent Appeal No. 730 of 2002, was pleased to confirm the view of the learned Single Judge.

10. I find that the ratio of the above decision of this High Court would squarely apply to the facts of the

present case. I find that the respondents have not quantified the loss caused to the Bank on account of the misconduct committed by the petitioner, which misconduct resulted into his dismissal from service, or at any rate such quantification was without giving any opportunity to the petitioner of being heard. In that view of the matter, I find that the respondents are not entitled to forfeit either the gratuity of the petitioner or even the employer's contribution to the provident fund. The question of giving an opportunity at this stage would also not arise in view of the fact that more than 20 years have passed since with-holding of the said amounts and respectfully following the ratio of the decision in the case of Jansukhlal C. Nagori Vs. Regional Manager, Union Bank of India (supra), I find that no further opportunity is required to be given to the respondents to hear the petitioner regarding the forfeiture of gratuity and provident fund. In the result, I find that the respondents are not entitled to forfeit any part of the gratuity of the petitioner or his provident fund, including the contribution of the employer. It is therefore directed that the respondents shall release the remaining amount of provident fund if any outstanding from the account of the petitioner along with 8% simple interest till actual payment. The respondents shall also pay to the petitioner gratuity considering his service upto 15.7.1983, with simple interest at the rate of 8% per annum from the said date till its actual payment. Any further entitlement of the petitioner towards gratuity shall be decided after the disciplinary proceedings as separately ordered in Special Civil Application No. 2186 of 1984 come to a close. With these directions the petition stands disposed of. Rule is made absolute accordingly.

11. In view of the findings in this decision, the security given by the petitioner for receiving the contribution to the provident fund shall stand released.

(Akil Kureshi, J.)

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